

Conditional Use Determination

Section 8 - Vermont Wetland Rules

In the matter of:

Champlain Parkway
Burlington, Vermont

Application for the construction of the Champlain Parkway
involving impacts to 20,620 sq ft of a Class II wetland
and 33,585 sq ft of buffer zone along Englesby Brook.

File #: 2010-125.01

DECID#: EJ96-0401

The Vermont Agency of Natural Resources received application #2010-125 for a Conditional Use Determination. This application has been publicly posted through December 1, 2010 and notice sent to all parties as required by Section 8.3 of the Vermont Wetland Rules. No comments were received during the public comment period. A permit extension request was received November 10, 2015. This request has been publicly posted through December 9, 2015 and notice sent to all parties as required by Section 8.3 of the Vermont Wetland Rules. Public comments were received during this public comment period. A responsiveness summary is attached.

Findings of Fact

After careful examination of this application, the Agency finds:

1. A complete application was received from Stantec Consulting Services, representative for the City of Burlington, Vermont, for Conditional Use Determination #2010-125 on September 9, 2010. A permit extension request was received November 10, 2015.
2. The wetland and adjacent 50-foot buffer zone are located along Englesby Brook on the west side of Pine Street in Burlington, Vermont.
3. Alan Quackenbush, former Wetlands Program Manager, conducted a site visit to the subject wetland on September 29, 2010. Tina Heath and Julie Foley, District Wetlands Ecologists, conducted a site visit to the subject wetland on December 18, 2015. An additional site visit was conducted May 3, 2016 by Tina Heath, District Wetlands Ecologist and Laura Lapierre, Wetlands Program Manager.
4. The subject wetland is identified on the Vermont Significant Wetlands Inventory maps and is therefore designated as a Class Two wetland in the Vermont Wetland Rules.
5. The wetland in question is a 13-acre wetland complex in a ravine along Englesby Brook. The wetland is primarily wet meadow dominated by false hellebore, sensitive fern, and spotted touch-me-not, along with red osier dogwood, box elder, and black willow. The

buffer zone is forested along the slopes of the ravine and in commercial and industrial use in the area surrounding the ravine.

6. This proposal involves the construction of the Champlain Parkway, formerly known as the Southern Connector, along with a shared-use path. The roadway and path bisect the wetland. A 120-ft long, 12-ft wide, and 8-ft high culvert with a natural streambed bottom will be installed in Englesby Brook. Stormwater structures will be installed on both the north and south sides of the crossing. The project will impact 20,620 sq ft of wetland and 33,585 sq ft of buffer zone.
7. The applicant has submitted a complete application including the following:
 - Champlain Parkway Natural Resources Map
 - Wetland H/I impacts detail figure
 - Wetland Data Sheets and Functional Assessment
 - Wetland H/I photographs
8. The protected functions of the wetland in question include at least the following: water storage for flood water and storm runoff (§5.1), and fish habitat (§5.3).
9. The following functions are either not present or are present at such a minimal level as to not be protected functions: surface and groundwater protection (§5.2), wildlife and migratory bird habitat (§5.4), exemplary natural community (§5.5), threatened and endangered species habitat (§5.6), education and research in natural science (§5.7), recreational value and economic benefit (§5.8), open space and aesthetics (§5.9), and erosion control through binding and stabilizing the soil (§5.10).
10. The subject wetland is significant for the water storage for flood water and storm runoff because it provides temporary water storage in depressional areas adjacent to Englesby Brook. It also provides physical space for floodwater expansion and stormwater storage and has a constricted outlet downstream. The small watershed of the brook is in a highly urbanized setting and has become impaired due to stormwater impacts. Detailed hydraulic analysis was used to design additional stormwater treatment in the project area. This includes stormwater ponds, grass-lined swales and re-routed stormwater. These improvements will increase the temporary water storage capacity of the watershed. Based on the above, there will be no undue adverse impact to this function.
11. The subject wetland is significant for fish habitat. Two uncommon fish species have been documented at the mouth of Englesby Brook: Mottled Sculpin (*Cottus bairdi*) and Rosyface Shiner (*Notropis rubellus*). The wetland and brook crossing have been designed to allow for aquatic organism passage, and to maintain a natural stream bed. Based on the above, there will be no undue adverse impact to this function.
12. This project, formerly known as the Southern Connector, connecting I-189 with downtown Burlington, has been under study for a number of years. The current design was found to be the preferred alternative, given the highly developed nature of the area. As a result, the impacts to the wetland are unavoidable, but do not result in an undue adverse impact on the protected functions.

13. If the project is constructed according to the specifications of the application and accompanying site plans, and the conditions of this Conditional Use Determination, the resulting wetland and buffer zone alteration is not expected to result in any violations of the Vermont Water Quality Standards.

Conclusions of Law

Based on information provided by the applicant and their representatives in the application for Conditional Use Determination, the Agency of Natural Resources concludes:

Under 10 V.S.A. §905b and Section 8 of the Vermont Wetland Rules, effective February 23, 1990, the Secretary may authorize conditional uses in a significant wetland or in its adjacent buffer zone. The Rules state that each Class Two wetland is presumed to serve all of the wetland functions identified in the Rules (Section 4.2b). Protected functions are distinguished from other wetland functions in Section 2.20, as those functions that make a wetland so significant they merit protection under these rules. Under Section 8.5a, the Secretary may only authorize a conditional use when it is determined that the proposed conditional use will have no undue adverse effect on the protected functions, unless the Secretary determines such impacts are sufficiently mitigated.

The proposed conditional use cannot practicably be located outside the wetland and buffer zone or on another site owned, controlled or available to satisfy the basic project purpose. All practicable measures have been taken in this proposal to avoid adverse impacts on protected functions.

The Agency determines that the proposed conditional use, described in the Findings of Fact and in the Conditional Use Determination application in question, will have no undue adverse impacts to the protected functions of the Class Two wetland on this subject property or the adjacent wetland complex.

Decision

1. The Vermont Agency of Natural Resources finds, that on the basis of the information provided in the application for Conditional Use Determination, there is reasonable assurance that the proposed conditional use will have no undue adverse effects on the protected functions of the significant wetland on this property provided the provisions of the application are supplemented with the procedures described below. This Conditional Use Determination is therefore approved with the following conditions:
 - A. All activity shall be completed, operated and maintained as set forth in accordance with the proposal in Conditional Use Determination Application #2010-125 and all submittals listed in Finding of Fact #7 above. No material or substantial changes shall be made in the project without the written approval of the Vermont Wetlands Office.
 - B. The applicant shall notify the Vermont Wetlands Office in writing prior to the start of this project.
 - C. A continuous line of orange snow fence shall be installed along the limit of disturbance prior to the start of construction. A continuous line of silt fence shall be

properly installed by the applicant immediately up-gradient of the snow fence prior to any construction and shall be regularly maintained. Care should be taken to ensure that silt fence is installed on the contour and not in areas of concentrated flow such as stream channels or ditches. Sediment shall be cleaned out before and after any significant storm event or when they have reached less than half the height of the fence. Removed sediments shall be disposed of in a stable, upland area outside the 50-foot buffer zone at least 200 feet from waters of the state and stabilized immediately with seed and mulch at a minimum. All other disturbed soils shall be seeded and mulched within 48 hours of final grading. All sediment barriers and construction fencing shall be removed following the successful establishment of vegetation.

- D. All construction activities in the wetland and adjacent 50-foot buffer zone shall be performed in compliance with Condition A and shall be completed within five years of the date of this Conditional Use Determination amendment or this Conditional Use Determination will terminate. The Secretary has granted an extension to the original five-year period. No other extensions shall be granted.
 - E. The wetland boundary determination is valid for five years from the date of this determination. The delineation will need to be re-evaluated by a qualified wetland consultant if the project is not constructed, or additional impacts are proposed, after the five-year time period expires.
 - F. The applicant shall monitor the portion of the wetland in question annually during early July for five years following construction for the nuisance plant species purple loosestrife (*Lythrum salicaria*) and common reed (*Phragmites australis*). All nuisance plants found shall be pulled by hand and disposed of by burial or burning in a non-wetland location. Additionally, the contractor's equipment shall be cleaned so as to contain no observable soil or vegetation prior to work in wetlands and buffer zones to help prevent the spread of invasive species.
2. The Agency maintains continuing jurisdiction over this project and may at any time order remedial measures be taken if it appears likely that adverse impacts to the protected functions and values will occur.
 3. This Conditional Use Determination does not relieve the applicant of the responsibility to comply with any other applicable federal, state, and local laws, regulations, and permits.
 4. By acceptance of this Conditional Use Determination the applicant agrees to allow representatives of the Department of Environmental Conservation access to the property covered by the Conditional Use Determination, at reasonable times, for the purpose of ascertaining compliance with this Conditional Use Determination, the Vermont Wetland Rules and the Vermont Water Quality Standards. The applicants shall also provide access to Department representatives to review and copy all records required to be prepared pursuant to this Conditional Use Determination.
 5. The Department, by issuing this Conditional Use Determination, accepts no legal responsibility for any damage direct or indirect of whatever nature and by whomever suffered arising out of the approved project.

Appeals

Any person with an interest in this matter may appeal this decision pursuant to 10 V.S.A. § 917. Pursuant to 10 V.S.A. chapter 220, any appeal of this decision must be filed with the clerk of the Environmental Division of the Superior Court within 30 days of the date of the decision. The Notice of Appeal must specify the parties taking the appeal and the statutory provision under which each party claims party status; must designate the act or decision appealed from; must name the Environmental Division; and must be signed by the appellant or their attorney. In addition, the appeal must give the address or location and description of the property, project, or facility with which the appeal is concerned; the name of the permittee; and any permit involved in the appeal. The appellant must also serve a copy of the Notice of Appeal in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings. For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Division is: 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401 (Tel. # 802-951-1740).

Alyssa B. Schuren, Commissioner
Department of Environmental Conservation

by: _____
Laura Lapierre
Wetland Program Manager, Watershed Management Division

Dated at Montpelier, Vermont
this eighth day of September, 2016

**RESPONSE SUMMARY FOR THE EXTENSION OF WETLAND CONDITIONAL USE
DETERMINATION #2010-125 (2011) FOR THE CONSTRUCTION OF THE
CHAMPLAIN PARKWAY**

RE: Construction of the Champlain Parkway, involving impacts to 20,620 square feet of Class II wetland and 33,585 square feet of wetland buffer along Englesby Brook in Burlington, Vermont

The above referenced Conditional Use Determination (CUD) allows for the construction of a transportation link (the Champlain Parkway), as well as a shared-use path, providing access between I-189, Shelburne Road, and the downtown district in Burlington, Vermont. The impacted wetland (wetland H/I) is a 13-acre wetland complex with an adjacent 50-foot buffer, located in a ravine along Englesby Brook on the west side of Pine Street in Burlington. Wetland H/I is identified on the Vermont Significant Wetlands Inventory maps, and is therefore designated a Class II wetland (Vermont Wetland Rules § 2.07). The proposed roadway and shared-use path will bisect the wetland, and a 120-foot long, 12-foot wide, and 8-foot high culvert with a natural streambed bottom will be installed in Englesby Brook. Stormwater structures will be installed on the north and south sides of the brook crossing.

CUD #2010-125 was issued on January 14, 2011, and expired on January 14, 2016. The Applicant City of Burlington timely submitted a request for a five-year extension of the CUD on September 29, 2015, pursuant to Vermont Wetland Rules (VWR) Section 9.1, and CUD #2010-125 Decision, ¶ 1(D). The Vermont Department of Environmental Conservation (the Department) placed the request on notice on November 25, 2015. During the notice period, comments were submitted on behalf of Fortieth Burlington, LLC. The following is a summary of the comments received from Fortieth Burlington, and the Department's response to those comments.

Comment 1: The September 29, 2016 request for an extension of CUD #2010-125, filed by the City of Burlington, did not include a re-delineation of wetland H/I, or any field data regarding the current conditions of the wetlands on the project site. An extension of a CUD cannot be granted until the site has been re-evaluated.

Response 1: The Department acknowledges that a re-delineation of the wetlands on the project site, is required by CUD #2010-125 Decision ¶ 1(E) for a permit extension. On December 18, 2015, the Department requested updated information supporting the Applicant's statements that the wetland areas and wetland impacts approved in the original CUD had not changed. CUD #2010-125 was administratively continued, pursuant to 3 V.S.A. § 814 until the Applicant's consultants were able to re-evaluate the wetlands on the project site and provide updated delineations to the Department. Site visits were conducted on December 28, 2015, and May 3, 2016, and attended by Applicant's consultant, John Greaves, and Vermont Wetlands Program staff Tina Heath and Julie Foley in December and attended by David Allerton, the Applicant's consultants, John Greaves and Polly Harris, and Vermont Wetlands Program staff Tina Heath, Brock Freyer, and Laura Lapierre. Previously delineated wetlands were re-delineated and field-verified in December 2015, and delineations were provided for two additional wetlands

found on the project site (wetlands P and Q) in May 2016. The re-delineation of all wetlands on the project site was conducted in accordance with the VWR, Section 3.

Comment 2: The wetlands on the project site that were determined not to be jurisdictional when CUD #2010-125 was originally issued have not be delineated since 2004, and the Applicant should re-evaluate these wetlands under the classification criteria provided by the current VWR before the CUD is extended.

Response 2: Amendments to the VWR went into effect after the complete application for CUD #2010-125 was filed with the Department. Among those amendments, changes were made to Section 4 of the Rules regarding the classification of Class II wetlands, expanding the Wetland Program's jurisdiction to include presumptive jurisdiction over wetlands demonstrating certain characteristics (see VWR § 4.6).

The site visits and the delineations of the wetlands on the project site that occurred on December 28, 2015 and May 3, 2016 were conducted according to the Vermont Wetland Rules currently in effect. All wetlands on the project site, including previously undelineated wetlands discovered on the project site (wetlands P and Q) were evaluated according to the criteria articulated in the current VWR, and were evaluated to determine if they met any of the presumptions listed in Section 4.6 of the Rules. Based on the delineations conducted in May of 2016, no additional Class II (jurisdictional) wetlands will be impacted by the project. The boundaries of impacted wetland H/I have not changed, and wetlands A, P, and Q were determined, based on field evaluations, to not meet any of the criteria listed in Section 4 of the VWR that would result in their classification as Class II. Wetlands J, K, and N were determined, based on field evaluations, to meet the criteria listed in Section 4 of the VWR, however based on a functions and values evaluation they were determined to be limited in function and therefore Class III.

Comment 3: There is insufficient information to support Applicant's burden for issuance of an individual wetland permit under Section 9 of the Vermont Wetland Rules

Response 3: The Applicant City of Burlington has applied for a five-year extension of the previously issued CUD #2010-125, pursuant to CUD #2010-125 Decision, ¶ 1(D):

“All construction activities in the wetland and adjacent 50-foot buffer zone shall be performed in compliance with Condition A and shall be completed within five years of the date of this Conditional Use Determination or this Conditional Use Determination will terminate. The Secretary may grant an extension to this five-year period. Any request for an extension must be received by the Department at least 30 days prior to the end of the five-year period in order to prevent the termination of this Conditional Use Determination. A request for extension will be considered a minor modification.”

Conditional Use Determination #2010-125, Decision at 1(D).

The Applicant has requested an extension of the originally issued CUD, for the same project and the same impacts to the wetland resources; the Applicant has not requested an individual wetland permit. In response to Fortieth Burlington, LLC's comments, the Department acknowledges that the CUD #2010-125 was evaluated under the previous Vermont Wetland Rules, because the complete Application for CUD #2010-125 was received by the Department before the current Vermont Wetland Rules went into effect on September 15, 2010. Sec. 14, Vermont Act 31, 2009. Thus CUD #2010-125 was reviewed in accordance with those regulations in place at the time of application. *Smith v. Winhall Planning Commission*, 140 Vt. 178 (1981).

The burden applicants must meet in order to receive an individual permit or a Conditional Use Determination has not changed between the previous iteration of the Vermont Wetland Rules and those Rules currently in place. Under both the previous and current Rules, an applicant has the burden to show that a proposed activity in a Class II wetland or its buffer zone will have no undue adverse effect on the protected functions of the wetland (see Vermont Wetland Rules, § 8.5(a) (2002); Vermont Wetland Rules § 9.5(a) (2010)). Therefore, the project and its impacts were evaluated according to the same standard in effect under the current Rules. Furthermore, the wetlands on the project site were re-delineated in 2015 and 2016 and were evaluated based on the presumptions articulated in Section 4.6 and 5 of the current VWR.

Comment 4: The Applicant's request for an extension of CUD #2010-125 fails to address whether stormwater treatment practices required under the Lake Champlain TMDL, Vermont Act 64 (2015), or the updated Vermont Stormwater Management Manual, will have an impact on wetland H/I.

Response 4: At this time, Individual Stormwater Discharge Permit No. 3368-INDS is still in effect, and there are no proposed changes to the stormwater treatment practices on the project site that would change the proposed impacts to Wetland H/I. Furthermore, the final Lake Champlain TMDL Phase 1 Implementation Plan has not been approved by EPA, and it is currently not clear what new requirements will be applicable to the renewal of the stormwater discharge permit at this project site. Any assessment of possible changes to the required stormwater treatment practices at this project site would be speculative at this time.